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**Documenting Discrimination on the Basis of Sexual Orientation
and Gender Identity in State Employment**

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Arkansas - Sexual Orientation and Gender Identity Law and Documentation of
Discrimination

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MEMORANDUM

From: Williams Institute

Date: September 2009

RE: **Arkansas – Sexual Orientation and Gender Identity Law and Documentation of Discrimination**

I. OVERVIEW

Arkansas has no state statutes or local ordinances prohibiting employment discrimination on the basis of sexual orientation or gender identity. The only two attempts to include such protections for public employees were subsequently rescinded. In 1990, one Arkansas county added sexual orientation as a protected class to its personnel policy. That policy was rescinded in 1998 because opponents argued that it was not required under federal law and that it validated “repugnant” and “immoral” sexual behaviors.¹ In 1998, when a city council in Arkansas passed a resolution against sexual orientation discrimination in city employment, that resolution was quickly vetoed by the city’s mayor. When the city council overrode the veto, the protection was repealed by voters.² No Arkansas counties or cities have since prohibited employment discrimination on the basis of sexual orientation or gender identity.

In addition to this pattern of rescission of even local civil rights protections, documented examples of employment discrimination on the basis of sexual orientation and gender identity by state and local government employers in Arkansas include:

- A counselor and eighth-grade teacher applied for teaching job and was told by the principal and assistant principal that they had heard he was gay. Despite assurances that he would be hired, he was not offered the job.³
- When the Supreme Court of Arkansas struck down that state’s sodomy law in 2002⁴, it noted the impact of the state law on employment. The the opinion discusses the fact that the plaintiffs “fear prosecution for violations of the statute and claim that such prosecution could result in their loss of jobs” and “professional licenses.”⁵ Three of the plaintiff/appellees brought up employment discrimination as they set forth the harms they had suffered because of the law.⁶

¹ Michael Rowett, *Orientation on Sex Out as JPs Trim Bias Shield*, ARK. DEMOCRAT GAZETTE, July 12, 1998, at B1.

² Laura Kellams, “Dignity” Policy Hurts Businesses, Opponents Argue, ARK. DEMOCRAT-GAZETTE, Sept. 26, 1998, at B10.

³ HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA’S WORKPLACES (2001), available at <http://www.hrc.org/documents/documentingdiscrimination.pdf>.

⁴ *Jegley v. Picado*, 349 Ark. 600, 608 (Supreme Court of Arkansas, 2002).

⁵ *Id.* at 609.

⁶ Appellee’s Supplemental Abstract, Brief, and Supplemental Addendum at xv, *Jegley*, 349 Ark. 600 (No. 01-815).

One plaintiff/appellee had been hired as a school counselor, but when school administrators learned he was gay, they refused to honor his contract⁷; another had to conceal her relationship because her lover was afraid she would be fired from her teaching job if her sexual orientation became known⁸; and a third feared that if his sexual orientation became known, he would be reported to the State Board of Nursing and lose his nursing license.⁹

In 2002, the Arkansas Supreme Court ruled that the state's sodomy law was unconstitutional.¹⁰ In holding that the plaintiffs had standing to challenge the law, the Arkansas Supreme Court held that the statute's mere existence triggered a stigma against homosexuals, and served as a tool for government officials to discriminate against homosexuals in arenas such as employment and parental rights.¹¹

In 2008, Arkansas banned by state-wide vote the ability of same-sex couples to adopt children.¹² Arkansas is also one of the few states in the United States that does not have a hate crimes law.¹³ When asked on a national television show how he felt about gay rights, former governor Mike Huckabee suggested, "It's a different set of rights," noting that the gay rights movement had not suffered the kind of struggle and violence that confronted the black civil rights movement.¹⁴

Part II of this memo discusses state and local legislation, executive orders, occupational licensing requirements, ordinances and policies involving employment discrimination based on sexual orientation and gender identity, and attempts to enact such laws and policies. Part III discusses case law, administrative complaints, and other documented examples of employment discrimination by state and local governments against LGBT people. Part IV discusses state laws and policies outside the employment context.

⁷ Aff. of Brian Manire, *Jegley*, 349 Ark. 600 (No. 01-815).

⁸ Aff. of Charlotte Downey, *Jegley*, 349 Ark. 600 (No. 01-815).

⁹ Aff. of George Townsend, *Jegley*, 349 Ark. 600 (No. 01-815).

¹⁰ *See Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002).

¹¹ *See id.*; Arthur S. Leonard, *Arkansas Supreme Court Rules Sodomy Law Inapplicable to Private, Consensual Sex*, LESBIAN & GAY L. NOTES 107 (Summer 2002).

¹² On November 4, 2008, Arkansas voters enacted a law that prohibits adoption by an individual "cohabitating with a sexual partner outside a marriage." NAT'L GAY & LESBIAN TASK FORCE, ADOPTION LAWS IN THE U.S. (2008). *See infra*, Section IV.H.

¹³ Human Rights Campaign, State Law Listings, State Laws, <http://bit.ly/45KeeL> (last visited Sept. 5, 2009). *But see infra* Section IV.D (discussing unsuccessful attempts to enact hate crimes bills that includes sexual orientation as a protected class).

¹⁴ *See THE VIEW* (ABC Nov. 18, 2008), <http://bit.ly/WXt92> (last visited Sept. 5, 2009).

II. SEXUAL ORIENTATION & GENDER IDENTITY EMPLOYMENT LAW

A. State-Wide Employment Statutes

The state of Arkansas has not enacted laws to protect against sexual orientation and gender identity employment discrimination.¹⁵

B. Attempts to Enact State Legislation

1. Proposed Bill to Amend Arkansas' Civil Rights Statute

In 2005, House Bill 2751 was introduced to amend the state's civil rights statute to include prohibition of discrimination because of sexual orientation.¹⁶ Gender identity was not included as a protected class. "Sexual orientation" was defined as "heterosexuality, homosexuality, or bisexuality."¹⁷ The bill died in committee. No hearing transcripts are available.

C. Executive Orders, State Government Personnel Regulations & Attorney General Opinions

1. Executive Orders

None.

2. State Government Personnel Regulations

State law prohibits state employment discrimination on the basis of "race, creed, religion, national origin, age, sex or gender."¹⁸ Sexual orientation and gender identity are not protected characteristics.

3. Attorney General Opinions

None.

D. Local Legislation

1. City of Fayetteville

On April 21, 1998, the City of Fayetteville's council passed the Human Dignity Resolution, which added sexual orientation and familial status as protected categories in the city's nondiscrimination policy for public employees.¹⁹ Then mayor of Fayetteville Fred Hanna subsequently vetoed the resolution, but in an unprecedented action, the city

¹⁵ ARK. CODE ANN. § 16-123-102 (2001).

¹⁶ Ark. HB 2751 (2005).

¹⁷ *Id.*

¹⁸ ARK. CODE ANN. § 21-12-103 (2008).

¹⁹ Press Release, Nat'l Gay & Lesbian Task Force, Election Night Round Up (Nov. 4, 1998) (describing Resolution 51-98).

council overrode the veto. This prompted a group, Citizens Aware, to oppose the resolution and bring the matter to a public vote. The Citizens Aware campaign coordinator argued, “The question is, what is the second, third and fourth step [gay rights supporters] have in mind?”²⁰ In November 1998, voters repealed the resolution.²¹

2. County of Washington

In 1990, Washington County became the first Arkansas county to add sexual orientation as a protected characteristic in its personnel policy.²² In 1998, however, the Washington County Quorum Court voted 8-4 to remove sexual orientation as a protected class, citing that such protection was not required under federal law and that it was unrelated to employment. Opponents of such protections believed that the protection validated “repugnant” and “immoral” sexual behaviors.²³ No other Arkansas counties have deemed sexual orientation to be a protected class for purposes of their personnel policies.

E. Occupational Licensing Requirements

A review of all occupational licensing boards²⁴ reveals that no occupational licensing requirements explicitly relate to sexual orientation or gender identity but that two state licensing requirements reference criteria that have been associated with discrimination against LGBT people, as follows:

State Board of Architects: An applicant must “be of good moral character, as verified by employers and registered architects.”²⁵

Real Estate Commission: A licensee is subject to disciplinary action if found to have committed “any act involving moral turpitude”²⁶ It is not defined as to who makes this determination.

Additionally, one state licensing board changed its regulations in response to the expulsion of an HIV-positive cosmetology student. In 2005, a cosmetology school in Paragould, Arkansas expelled Alan Dugas after he disclosed that he was HIV positive.²⁷ The school cited a State Board of Cosmetology regulation that barred individuals with

²⁰ Kellams, *supra* note 2, at B10.

²¹ Mike Rodman, *Human Dignity Resolution Fails*, NW. ARK. TIMES, Nov. 4, 1998.

²² Rowette, *supra* note 1, at B1.

²³ *Id.*

²⁴ The Arkansas occupational boards that issue licenses are the Arkansas Appraisers Licensing & Certification Board, Arkansas State Board of Public Accountancy, Contractors Licensing Board, Arkansas State Board of Cosmetology, Arkansas State Board of Embalmers & Funeral Directors, Arkansas Board of Engineers, Arkansas Mortgage Loan Brokers, Arkansas Notaries Public, Arkansas Real Estate Commission, Arkansas Social Workers, and Arkansas State Board of Architects.

²⁵ ARK. ARCHITECTURAL ACT RULES AND REG. § III.D(1)(a) (2005), *available at* <http://www.arkansas.gov/arch/rulesregs.pdf>.

²⁶ ARK. REAL ESTATE LICENSE LAW § 17-42-311 (7) (2007), *available at* <http://www.arkansas.gov/arec/LL%209-07.pdf>.

²⁷ ANNUAL UPDATE (ACLU LGBT Rights Project 2006), <http://www.aclu.org/lgbt/gen/index.html> (last visited Sept. 5, 2009).

infectious diseases from studying or practicing cosmetology.²⁸ After the ACLU intervened, however, the Board clarified its regulations by adding, “The term ‘infectious or communicable disease’ shall not include [HIV] or any other disease that similarly does not pose a significant risk to the health or safety of others during the performance of an act of cosmetology or any of its branches.”²⁹

²⁸ See ARK. BD. OF COSMETOLOGY, RULES & REG. § 15 (2007), available at <http://www.arkansas.gov/cos/index.html>.

²⁹ *Id.*

III. DOCUMENTED EXAMPLES OF EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE BY STATE AND LOCAL GOVERNMENTS

A. Case Law

- 1. State and Local Government Employees**
- 2. Private Employees**

B. Administrative Complaints

According to the Office of Personnel Management, which is responsible for overseeing the state's personnel system and responsible for establishing policies regarding employment, each state agency must provide a grievance procedure for complaints related to discrimination.³⁰ The specific requirements of such grievance procedures were not explained and a non-exhaustive search of electronic sources did not provide any examples of specific state agency grievance procedures.

C. Other Documented Examples of Discrimination

Arkansas Public School

"B.M." was a counselor and eighth-grade teacher at a junior high school from 1991-92. He applied for a job at the school where the principal and the assistant principal gave him verbal agreements that he would be hired. Afterward, however, they called B.M. in and said they had heard a rumor he was gay. As a result, B.M. was not hired.³¹

³⁰ DEP'T OF FINANCE & ADMIN POLICY & PROCEDURES MANUAL § 135.1.0 (Ark. Office of Pers. Mgmt. 2005), <http://bit.ly/1UDVUq> (last visited Sept. 5, 2009).

³¹ HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES (2001), available at <http://www.hrc.org/documents/documentingdiscrimination.pdf>.

IV. NON-EMPLOYMENT SEXUAL ORIENTATION & GENDER IDENTITY RELATED LAW

In addition to state employment law, the following areas of state law were searched for other examples of employment-related discrimination against LGBT people by state and local governments and indicia of animus against LGBT people by the state government, state officials, and employees. As such, this section is not intended to be a comprehensive overview of sexual orientation and gender identity law in these areas.

A. Criminalization of Same-Sex Sexual Behavior

In July 2002, the Arkansas Supreme Court ruled that the state same-sex sodomy law was unconstitutional as applied to private consensual behavior.³² The sodomy statute specifically punished same-sex sexual conduct, even if the act was consensual and done in private. The Arkansas Supreme Court invalidated the statute on privacy and equal protection grounds. One deeply contested issue was whether the plaintiffs had standing to seek a declaratory judgment. Plaintiffs were made up of seven gay residents of Arkansas, none of whom had actually been prosecuted under the sodomy law, but who had engaged in the illegal behavior in private with consenting partners and planned to continue to do so. The state argued that since none of them had been prosecuted, and no evidence that they would be prosecuted was provided, that the plaintiffs lacked standing. The Arkansas Supreme Court, however, accepted the plaintiff's arguments that the statute's mere existence triggered a stigma against homosexuals, and served as a tool for government officials to discriminate against homosexuals in other arenas such as employment and parental rights.³³

B. Housing & Public Accommodations Discrimination

The Arkansas Fair Housing Commission receives, investigates, and resolves complaints related to allegations of discrimination based on "race, color, national origin, religion, sex, familial status and disability."³⁴ Sexual orientation and gender identity are not protected classes.

C. HIV/AIDS Discrimination

In the area of insurance underwriting, Arkansas Insurance Rule and Regulation 42 establishes standards to prevent unfair discrimination in reference to HIV. Under the regulation, insurance companies may require individuals to undergo mandatory HIV tests only if the testing is provided "on a nondiscriminatory basis for all individuals in the same class" and no proposed insured is denied covered or rated as substandard risk on the basis of such testing, unless an enzyme test returns positive results and a Western Blot test returns results that are not negative.³⁵

³² See *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002).

³³ See *id.* at 336-37; Arthur S. Leonard, *Arkansas Supreme Court Rules Sodomy Law Inapplicable to Private, Consensual Sex*, LESBIAN & GAY L. NOTES 107 (Summer 2002).

³⁴ Ark. Fair Housing Comm'n, <http://www.arkansasfairhousing.com> (last visited Sept. 5, 2009).

³⁵ ARK. INSURANCE RULE AND REGULATION 42 (2001), available at <http://bit.ly/1hGmxl>.

D. Hate Crimes

Despite several attempts to enact such laws, Arkansas is one of the few states in the United States that currently has no hate crimes law.

In 1995, House Bill 1257 was introduced, which would have provided for certain enhanced penalties for crimes committed because of a person's "race, color, ancestry, ethnicity, religion, national origin, gender, or sexual orientation," but the bill died in committee. No hearing transcripts are available.

In 2001, Senate Bill 35 and House Bill 2509 were introduced, this time providing for prison sentences to be 20 percent longer for crimes committed because of a person's actual or perceived race, color, religion, ethnicity, ancestry, national origin, sexual orientation, gender, or disability.³⁶ The 2001 push for hate crimes legislation was largely backed by then Attorney General Mark Pryor.³⁷ The bills, however, failed to pass.

In 2003, Senate Bill 765 was proposed, this time prescribing rehabilitation instead of increased prison terms for people convicted of hate crimes.³⁸ The bill included sexual orientation as a protected class. The bill passed in the Senate, but died in a House committee. No hearing transcripts are available.

E. Education

Based on the same-sex marriage ban, discussed *infra* in Part IV.I.1, separate legislation prohibiting any definition of marriage in public school textbooks that is contrary to the ban was passed in the House in 2005, but died in Senate committee.³⁹

In 2005, the House passed House Bill 1136, a bill that would have barred all representations of homosexual people in any public school textbooks describing marriage. The bill would have required books to define marriage as only a "union between one man and one woman."⁴⁰ The bill passed in the House but failed in a Senate committee. No hearing transcripts are available.

In *Wolfe v. Fayetteville, Arkansas School District*, a federal district court reviewed a motion to dismiss various claims by the parents of Billy Wolfe, an adolescent boy who had allegedly been repeatedly bullied and harassed at school for his perceived sexual orientation.⁴¹ The parents brought actions under 42 U.S.C. § 1983 for sex discrimination, perceived sexual orientation discrimination, discrimination based on the anti-homosexual nature of attacks, violation of First Amendment rights, and denial of due process. Claiming that school officials had failed to act appropriately in response to the bullying, the plaintiffs further brought causes of action under Arkansas state law for outrage, deprivation of the right not to be bullied, negligent supervision, defamation, and

³⁶ Ark. S.B. 35 (2001); Ark. H.B. 2509 (2001).

³⁷ Seth Blomeley, *Legislature Passed 20 Bills Touted by Pryor*, ARK. DEMOCRAT-GAZETTE, Apr. 20, 2001, at A5.

³⁸ Ark. S.B. 765 (2003).

³⁹ Ark. H.B. 1136 (2005).

⁴⁰ *Id.*

⁴¹ *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 600 F.Supp.2d. 1011 (W.D. Ark 2009).

false light. Considering the defendant's motion to dismiss for failure to state a claim, the court found that plaintiffs had properly stated claims under § 1983 for sex discrimination, perceived sexual orientation discrimination, discrimination based on the anti-homosexual nature of attacks and First Amendment retaliation, as well as the state claims for negligent supervision, defamation and false light.⁴²

In finding that plaintiffs had properly stated certain claims, the court considered alleged facts such as the continuous nature of the harassment and the inappropriate acts by certain school officials in response to such harassment. Billy Wolfe was allegedly repeatedly taunted and beaten by his classmates while being called "fag" and "homo."⁴³ The plaintiffs reported the behavior to school officials, who would do nothing in response. The alleged harassment continued for years, with no response by school officials to the plaintiffs' numerous complaints. On one occasion, students had formed a Facebook group called "Everyone that Hates Billy Wolfe," featuring a photo of Billy's face superimposed over Peter Pan, with a description stating, "There is no reason anyone should like Billy he's a little bitch [sic]. And a homosexual that NO ONE LIKES."⁴⁴ Comments left by group members were anti-homosexual and threatening in nature, and when plaintiffs reported the group to the vice principal, the vice principal asked, "Well, is he a homosexual?"⁴⁵ More harassment followed, ultimately forcing plaintiffs to file the current suit.⁴⁶ The plaintiffs' specific causes of action that survived the motion to dismiss have yet to be adjudicated.

F. Parenting

In *Taylor v. Taylor*,⁴⁷ the Arkansas Supreme Court affirmed a lower court's issuance of a temporary custody order containing a non-cohabitation clause prohibiting a divorced mother's lesbian partner from remaining in the residence or staying overnight when the mother's children were present. The non-cohabitation restriction limits a parent's unmarried cohabitation and is a material factor considered in custody determinations.⁴⁸ While the Court emphasized that the non-cohabitation restriction applies to both heterosexual and homosexual relationships,⁴⁹ it seems that a divorced parent's subsequent relationship with a member of the same sex could serve as grounds for removing children in custody of that parent since Arkansas bans same-sex marriage, forcing every same-sex relationship to run into the non-cohabitation restriction.

⁴² *Id.* (dismissing the state law claims for outrage and deprivation of the right not to be bullied).

⁴³ *Id.*

⁴⁴ Dan Barry, *A Boy the Bullies Love to Beat Up, Repeatedly*, NY TIMES, Mar. 24, 2008, available at <http://bit.ly/JHbPk>.

⁴⁵ *Wolfe*, 600 F.Supp.2d at 1017.

⁴⁶ *See id.*

⁴⁷ 47 S.W.3d 222 (Ark. 2001).

⁴⁸ *Id.* at 225.

⁴⁹ *Id.*

In 2005, the Arkansas legislature considered House Bill 1119 which would have banned homosexuals from becoming foster or adoptive parents. The bill, however, died in a Senate committee.

In *Department of Human Services v. Howard*, the Arkansas Supreme Court struck down Regulation 200.3.2, which prohibited homosexuals and anyone living in a household with a homosexual adult from being foster parents. The Court found that the regulation did nothing to promote the health, welfare, and safety of the foster children, and simply excluded a group of people based on morality and bias.⁵⁰ As such, the Court held that the Child Review Agency Board overstepped its authority and infringed on the Legislature's powers.

In 2007, reacting to the Arkansas Supreme Court's 2006 ruling in *Howard*,⁵¹ the Senate committee passed Senate Bill 959, a bill that would have categorically banned homosexuals from adopting or serving as foster parents. The bill, however, died in a House committee.

In 2008, again in reaction to the 2006 *Howard* ruling, a law prohibiting adoption by an individual "cohabiting with a sexual partner outside of a marriage" was enacted by statewide vote. The law applies to both same-sex and opposite-sex cohabiting couples.⁵² The group largely responsible for pushing the measure was the Family Council Action Committee. The group cited several motivations, one of which was "to blunt a homosexual agenda."⁵³ On December 30, 2008, the ACLU filed a complaint in the Pulaski County Circuit Court in Arkansas seeking to strike down the law as a violation of federal and state constitutional rights to equal protection and due process.⁵⁴ The case is still pending as of the date of this memorandum.

G. Recognition of Same-Sex Couples

1. Marriage, Civil Unions & Domestic Partnership

In 2004, Arkansas voters approved an amendment to ban same-sex marriage and civil unions.⁵⁵ Amendment 83 of the Arkansas Constitution states that, "Marriage consists only of the union of one man and one woman."⁵⁶ Any marriage between members of the same sex is void.⁵⁷

⁵⁰ 238 S.W.3d 1 (Ark. 2006).

⁵¹ *Id.*

⁵² NAT'L GAY & LESBIAN TASK FORCE, ADOPTION LAWS IN THE U.S. (2008).

⁵³ Steve Chapman, *Gay Adoption: The Real Agenda*, CHI. TRIB., Nov. 30, 2008, at C30.

⁵⁴ Press Release, ACLU of Ark., ACLU Asks Court to Strike Down Arkansas Parenting Ban, ACLU of Arkansas (Dec. 30, 2008) available at <http://bit.ly/hGZY4>; see also *Cole v. Ark.*, No. CV2008-14284 (Ark. Cir. Ct. Pulaski County) (Pl. Complaint), available at <http://bit.ly/akuxD>.

⁵⁵ *2004 Ballot Measures Election Results*, CNN, <http://bit.ly/JC1E3> (amendment had 75% for it).

⁵⁶ ARK. CONST. AMEND. 83, § 1 (2004).

⁵⁷ ARK. CODE ANN. § 9-11-107 (2008).